Exhibit 2

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12 MICROSOFT CORPORATION

13   UNITED STATES DISTRICT COURT

14   NORTHERN DISTRICT OF CALIFORNIA

15   OAKLAND DIVISION

16

17 INTERTRUST TECHNOLOGIES   Case No. C 01-1640 SBA (MEJ)
   CORPORATION, a Delaware corporation,
18   Consolidated with C 02-0647 SBA (MEJ)
                  Plaintiff,
19   MICROSOFT'S NOTICE OF
        v.   MOTION, MOTION AND
20   MEMORANDUM IN SUPPORT OF
   MICROSOFT CORPORATION, a   ITS MOTION FOR PARTIAL
21 Washington corporation,   SUMMARY JUDGMENT OF
                                        INVALIDITY OF THE ASSERTED
22   Defendant.   CLAIMS OF THE '181 PATENT
                                        (ANTICIPATION)
23
                                        Date: March 30, 2004
24 AND RELATED CROSS-ACTION.   Time: 1:00 p.m.
                                        Judge: Saundra B. Armstrong
25

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NOTICE OF MOTION

Pursuant to Fed. R. Civ. P. 56(b) and 35 U.S.C. § 102(b), Defendant Microsoft Corporation ("Microsoft") respectfully moves for Partial Summary Judgment of Invalidity of the Asserted Claims of the '181 Patent. This motion is noticed for March 30, 2004 at 1:00 p.m. and is based upon this Notice and Memorandum of Points and Authorities, the Declaration of Sam O'Rourke and exhibits thereto. Pursuant to the Court's Standing Order, Microsoft met and conferred with counsel for InterTrust prior to filing this motion. Declaration of Eric L. Wesenberg In Support of Microsoft's Motion For Partial Summary Judgment of Invalidity of the Asserted Claims of the '900 Patent at ¶ 6.

MEMORANDUM OF POINTS AND AUTHORITIES

I.   INTRODUCTION

Microsoft moves for summary judgment of invalidity of all asserted claims of U.S. Patent No. 6,112,181 (the "'181 patent"),[1] pursuant to 35 U.S.C. § 102(b), based on the anticipatory disclosure of the prior art International Publication Number WO96/27155, published under the Patent Cooperation Treaty on September 6, 1996 (the "PCT" publication).[2] The PCT publication was published more that one year prior to the application for the '181 patent and discloses every limitation of each asserted claim of the '181 patent. InterTrust did not cite the PCT publication during the prosecution of the '181 patent and, therefore, the examiner did not take it into consideration as prior art in issuing the claims that are asserted against Microsoft.

Granting Microsoft's summary judgment motion will render the asserted claims of the '181 patent invalid, simplifying this case by eliminating fourteen claims and the need for a jury to learn and understand the '181 patent technology. It would also eliminate the need to

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[1]   The '181 patent is attached as Exhibit A to the Declaration of Sam O'Rourke.

[2]   The "PCT" publication is an application filed by InterTrust and is almost identical to InterTrust's U.S. Patent Application No. 08/388,107 (the "'107 application") filed on February 13, 1995, and later abandoned. The '107 application, often referred to as the "Big Book," spawned the majority of the InterTrust patents asserted against Microsoft in the present litigation. Many of the asserted patents are either continuations of the '107 application, or incorporate its specification by reference. The PCT publication (WO96/27155) is attached as Exhibit B to the Declaration of Sam O'Rourke.

1   consider Microsoft's "System Management Server (SMS)" product, versions 2.0 and later, as the

2   only claims asserted against this product are from the '181 patent.

3   **II.   LEGAL STANDARD**

4   **A.   Legal Standard For Summary Judgment**

5   The Federal Circuit has repeatedly emphasized that "[s]ummary judgment is as

6   appropriate in a patent case as it is in any other case." *Desper Prods. v. QSound Lab.*, 157 F.3d

7   1325, 1332 (Fed. Cir. 1998) (citing *C.R. Bard, Inc. v. Advanced Cardiovascular Systems, Inc.*,

8   911 F.2d 670, 672 (Fed. Cir. 1990); *See Avia Group International, Inc. v. L.A. Gear California,*

9   *Inc.*, 853 F.2d 1557, 1561 (Fed. Cir. 1988); *Spectra Corp. v. Lutz*, 839 F.2d 1579, 1581 n. 6 (Fed.

10   Cir. 1988); *Brenner v. United States*, 773 F.2d 306, 307 (Fed. Cir. 1985). "Summary judgment is

11   appropriate when there are no issues of material fact and the moving party is entitled to judgment

12   as a matter of law." *Liquid Dynamics Corp. v. Vaughan Co., Inc.*, 2004 U.S. App. LEXIS 1065,

13   *13 (Fed. Cir. Jan. 23, 2004); *See* Fed. R. Civ. P. 56(c). A fact is material if it "might affect the

14   outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248

15   (1986).

16   "With respect to whether there is a genuine issue, the court may not simply accept

17   a party's statement that a fact is challenged. (citations omitted) The party opposing the motion

18   must point to an evidentiary conflict created on the record at least by a counter statement of a fact

19   or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory

20   statements are insufficient." *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*,

21   731 F.2d at 835-36 (Fed. Cir. 1984).

22   **B.   Legal Standard For Patent Invalidity**

23   An individual is only entitled to a patent for an invention that is novel at the time

24   the invention was made. Thus, a defendant in a patent infringement action is entitled to summary

25   judgment of invalidity if it establishes by clear and convincing evidence that the applicant failed

26   to meet the requirements of patentability. *WMS Gaming Inc. v. International Game Tech.*, 184

27   F.3d 1339, 1355 (Fed. Cir. 1999). Microsoft moves for summary judgment of invalidity based on

28   35 U.S.C. § 102(b), which states that an individual is not entitled to a patent if their claimed

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1   invention "was patented or described in a printed publication in this or a foreign country . . . more

2   than one year prior to the date of the application for patent in the United States." Summary

3   judgment should be granted where the defendant demonstrates that each element of each

4   challenged claim is disclosed in a single prior art reference. *See Brown v. 3M*, 265 F.3d 1349,

5   1351 (Fed. Cir. 2001).

6   As stated above, Microsoft's motion is based upon the September 6, 1996

7   publication of PCT publication WO96/27155. InterTrust's '181 patent was filed on November 6,

8   1997. The PCT publication, therefore, was published a year and two months prior to the filing

9   date of the '181 patent and, as will be shown below, discloses all elements of the asserted claims

10 of the '181 patent. Thus, the PCT publication is invalidating prior art under 35 U.S.C. § 102(b),

11 as the purported invention of the asserted claims of the '181 patent was "described in a printed

12 publication in . . . a foreign country . . . more than one year prior to the date of the application

13 for" the '181 patent in the United States.

14 **III.   ARGUMENT**

15   The asserted claims of InterTrust's '181 patent recite a method for sending

16 selected digital information to selected recipients, using "rules and controls" to govern the use of

17 that information. The recipients are permitted to use the digital information in a controlled

18 environment that enforces the associated "rules and controls."

19   As shown below, the PCT publication discloses all of the elements with parallel

20 functionality as those recited in the asserted claims of the '181 patent.[3]

21 **A.   The PCT Publication Anticipates Claim 91 Of The '181 Patent**

22   Claim 91 of the '181 patent is the narrowest asserted independent claim.

23 Demonstration of how the PCT publication anticipates claim 91 will, therefore, simplify the

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27 [3]   The asserted claims of the '181 patent are claims 48, 59, 61, 62, 63, 70, 72, 75, 89, 91, 104, 114,
        117, and 131.

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analysis of how the PCT publication anticipates the broader asserted independent claim 48.[4]

Claim 91 states as follows:

91. A method for securely narrowcasting selected digital information to specified recipients including:

(a) receiving selected digital information in a secure container at a receiving appliance remote from a sending appliance, the receiving appliance having a secure node, the receiving appliance being associated with a receiving entity;

(i) the digital information having been selected at least in part based on the digital information's membership in a first class,

(ii) the first class membership having been determined at least in part using rights management information;

(b) the receiving entity having been selected at least in part based on said receiving entity's membership in a second class,

(i) the second class membership having been determined at least in part on the basis of information derived from the recipient entity's creation, use of, or interaction with rights management information;

(c) receiving at the receiving appliance rules and controls in a secure container,

(i) the rules and controls having been associated with the selected digital information; and

(d) using at the receiving appliance the selected digital information in accordance with the rules and controls,

(i) the rules and controls being enforced by the receiving appliance secure node.

The sections that follow demonstrate, on an element-by-element basis, that the PCT publication anticipates claim 91.

1. Claim 91 - Preamble

Claim Language	A method for securely narrowcasting selected digital information to specified recipients including:

---

[4] Dependent claims that reference claim 91 are addressed individually in the sections following the claim 91 analysis. Dependent claims that reference claim 48 follow the analysis of that claim.

- 4 -

A preamble limits the claimed invention if it "recites essential structure or steps, or if it is 'necessary to give life, meaning, and vitality' to the claim." *Smithkline Beecham Corp. v. Excel Pharms., Inc.*, 2004 U.S. App. LEXIS 1323, *13 (Fed. Cir. Jan. 29, 2004) (citing *Catalina Mktg. Int'l v. Coolsavings*, 289 F.3d 801, 808 (Fed. Cir. 2002)). In this case, the preamble of claim 91 recites the step of "narrowcasting" which is necessary to give life, meaning, and vitality to claim 91. This functionality is not otherwise recited in the body of claim 91, yet it is the subject of the alleged invention of the '181 patent. InterTrust chose to use both the preamble and the body of claim 91 to define the subject matter of the claimed invention. When limitations in the body of the claim rely upon and derive antecedent basis from the preamble, then the preamble may act as a necessary component of the claimed invention. *See, e.g., Electro Sci. Indus. v. Dynamic Details, Inc.*, 307 F.3d 1343, 1348 (Fed. Cir. 2002); *Rapoport v. Dement*, 254 F.3d 1053, 1059 (Fed. Cir. 2001). Here, the preamble of claim 91 is limiting.

The preamble recites a method for narrowcasting selected digital information to specified recipients. The term "narrowcast" has an ordinary and customary meaning, which is "[t]o transmit data to selected individuals. Contrast with *broadcast*." Alan Freedman, *Computer Desktop Encyclopedia, 9th Edition*, McGraw Hill (2001) (hereafter "Computer Desktop Encyclopedia") at 651.[5] Although the '181 specification fails to define "narrowcast," it uses the term consistent with its ordinary meaning:

> This display may be a "narrowcasting" to a customer based upon his matching priorities, available digital information resources (e.g., repository, property, etc.) and associated, available classification information.

'181 Patent 8:15-19.

The PCT publication discloses the narrowcasting of digital information. For example, it provides for the administering of an SAT examination to students at various schools or testing sites. PCT at 913. The example discloses narrowcasting functionality, in that the SAT

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[5]   The referenced pages of the Computer Desktop Encyclopedia are attached as Exhibit C to the Declaration of Sam O'Rourke.

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1 test to be administered (data) is transmitted to the particular schools or "test sites" (selected

2 individuals) administering the exam. *Id.* Specifically, the PCT publication states:

> A scheduled SAT examination for high school seniors is prepared by the Educational Testing Service. The examination is placed in a VDE container for scheduled release on November 15, 1994 at 1:00 PM Eastern Standard time. The SAT prepares one copy of the container for each school or other location which will conduct the examination. The school or other location ("test site") will be provided with a distributed examination container securely containing the VDE identification for the "administration" electronic appliance and/or test administrator at the test site (such as, a testing organization) and a budget enabling, for example, the creation of 200 test VDE content containers.

8 *Id.*[6]

9 Thus, the PCT publication discloses the narrowcasting aspect of the preamble of

10 claim 91 of the '181 patent.

2. Claim 91 – Element (a)

Claim Language	(a) receiving selected digital information in a secure container at a receiving appliance remote from a sending appliance, the receiving appliance having a secure node, the receiving appliance being associated with a receiving entity;

15 This element can be separated into six unique requirements, each of which is

16 disclosed by the PCT publication.

a. The PCT publication discloses a receiving appliance that receives information from a remote sending appliance

19 Claim 91, element (a) requires a receiving appliance to receive information from a

20 remote sending appliance. The term "appliance" is referenced in the specification of the '181

21 patent as follows:

> Such electronic interactions supported by the Distributed Commerce Utility may, for example, entail the broadest range of **appliances** and distribution media, non-limiting examples of which include networks and other communications channels, consumer **appliances**, computers, convergent devices such as WebTV, and optical media such as CD-ROM and DVD in all their current and future forms.

---

[6] Additional examples from the PCT publication include law firms using "VDE" to selectively distribute documents, including filing briefs electronically with the courts; VDE trial subscriptions for a newspaper; and automated tax collection, such as sales tax, using VDE. PCT at pp. 792-800, 610, and 690-91. The SAT example is simply illustrative.

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1   '181 Patent 35:25-31 (emphasis in quoted text has been added unless otherwise noted): "Although

2   the scope of the term "appliance" has not been determined by the Court, any construction would

3   certainly encompass the disclosure of the PCT publication, which states:

4   Electronic appliance 600 may be practically any kind of electrical or electronic
        device, such as:

5   a computer
                    a T.V. "set top" control box
6   a pager
                    a telephone
7   a sound system
                    a video reproduction system
8   a video game player
                    a "smart" credit card
9

10   PCT at 180. The PCT publication discloses a system whereby the appliance at each school or

11   testing site designated to administer the SAT test (receiving appliances) electronically receives an

12   SAT test from an Educational Testing Service appliance (sending appliance). PCT at 913. The

13   PCT publication specifically discloses a receiving appliance as follows:

14   The examination is placed in a VDE container for scheduled release . . . The
        SAT prepares one copy of the container for each school or other location which
15   will conduct the examination. The school or other location ("test site") will be
        provided with a distributed examination container securely containing the VDE
16   identification for the 'administration' electronic appliance . . .

17   *Id.* A sending appliance is also disclosed. The above-quoted passage states that a "VDE

18   container" is used for distribution. Creation of VDE protected objects (*i.e.* the "VDE container"

19   containing the SAT test) requires the use of a VDE appliance. PCT at 180, 189.

20   b.   **The PCT publication discloses a sending appliance located**
                       "remotely" from the receiving appliance
21

22   Element (a) requires the sending appliance to be located "remotely" from the

23   receiving appliance. One ordinary and customary meaning of the term "remote" in computer

24   science is:

25

26

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28

1   Located at a distance from another computer that is accessible by cables or other
2   communications links: *a remote terminal.*[7]

3   Dictionary.com Computer Science Dictionary (2004).[8] Use of the term "remote" in the '181

4   specification is consistent with this ordinary meaning:

5   distribution using VDE that may package both the electronic content and control
         information into the same VDE container, and/or may involve the delivery to
6   an end-user site of different pieces of the same VDE managed property
         from plural separate remote locations and/or in plural separate VDE content
7   containers and/or employing plural different delivery means;

8   '181 Patent 26:64–27:3.

9   The PCT publication discloses a system where an:

10   **Appliance 600 may communicate with the outside world through any of the**
         connections/devices normally used within an electronic appliance. The
11   **connections/devices shown along the bottom of the drawing are examples: a**
         "modem" 618 or other telecommunications link; . . . a "cable" 628
12   **connecting the appliance with a "network"**

13   PCT at 180-81. The fact that the Educational Testing Service is at a different location than the

14   multiple testing sites, coupled with the statement that appliances may be connected by modem,

15   cable or other telecommunications link, is a disclosure that the Educational Testing Service

16   (sending appliance) is located remotely from the testing sites (receiving appliances).

17   c.   <u>The PCT publication discloses the transmission of "digital</u>
              <u>information"</u>
18

19   Claim element (a) requires the information sent and received to be "digital

20   information." The PCT publication discloses an example of a system for the electronic

21   distribution and administration of an SAT exam where data is transferred in digital form, as the

22   test is placed in a VDE container. PCT at 913. All data in a computer is by necessity in digital

23   form.

24

25   _____
     [7]   *See also* "remote node" – "A remote user or workstation. Access to the company LAN is made
26   via POTS or ISDN modem to a connection at the remote access server". Computer Desktop Encyclopedia
     at 836.
27   [8]   The referenced pages of the Dictionary.com Computer Science Dictionary (2004) are attached as
     Exhibit D to the Declaration of Sam O'Rourke.
28

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d.   **The PCT publication discloses the transmission of digital information in a "secure container"**

Element (a) requires digital information to be transferred in a "secure container." "Secure container" has been construed by the Court to mean, "A container (defined *supra*) that is secure (define *supra*)." The Court construed "contain" to mean:

> To have within or hold. In the context of an element contained within a data structure (*e.g.* a secure container), the contained element may be either directly within the container or the container may hold a reference indicating where the element may be found.

Order Denying Motion for Partial Summary Judgment and Construing "Mini-*Markman* Claims" ("*Markman* Order"), July 3, 2003 (Docket #338), p.33.

The Court has construed "secure" to mean:

> One or more mechanisms are employed that (whether alone or in conjunction with one or more other mechanisms) prevent or discourage misuse of or interference with information or processes, or that detect misuse of or interference with information or processes for the purpose of discouraging and/or avoiding harm. Such mechanisms may include concealment, tamper resistance (defined *infra*), authentication (*i.e.* identifying (*e.g.*, a person, device, organization, document, file, etc.)), and access control. Concealment means that it is difficult to read information (*e.g.*, programs may be encrypted). Tamper resistance and authentication are defined separately. Access control means that access to information or processes is limited on the basis of authorization. Security is not absolute.

"Securely" means: "In a secure (defined *supra*) manner."

Markman Order at p. 48.

The PCT publication states that:

> The school or other location ("test site") will be provided with a distributed examination container securely containing the VDE identification for the "administration" electronic appliance and/or test administrator at the test site . . . and a budget enabling, for example, the creation of 200 VDE content containers.

PCT at 913. It further states that:

> . . . proper use of VDE 100 for the testing process can prevent improper access to test contents prior to testing . . .

PCT at 916. Thus, the VDE container is an example of a "secure" "container" as those terms have been construed by the Court.

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e. **The PCT publication discloses a "secure node" at the receiving appliance**

Element (a) recites a "secure node" at the receiving appliance. The Court's construction of "secure" is recited above. A node has the following ordinary meaning in computer science:

> In communications, a node is a network junction or connection point. For example, a personal computer in a LAN is a node. A terminal connected to a minicomputer or mainframe is a node.

Computer Desktop Encyclopedia at 674. Thus, a "secure node" includes a computer or terminal that prevents, discourages or detects misuse or interference with processes or information for the purpose of avoiding harm. Although the '181 specification does not define the term "secure node," it uses the term consistently with the ordinary meaning of the term:

> Referring again to FIG. 47A, each customer appliance 2052 may have a VDE secure node installation 2054 incorporating a protected processing environment 154, as described in 'Ginter et al', and messaging services software 2058 that manages communications with other appliances.

'181 Patent 56:18-22.[9]

The PCT publication discloses the user appliance as a "secure" node. In the case of the SAT testing example, the user appliance is the "'administration' electronic appliance" used for receiving the "VDE container" containing the examination and rules and controls governing its use. PCT at 913. As stated in the PCT publication, each such electronic appliance (node) may include a "Secure Processing Unit" or "SPU" (hence, "secure" node):

> Each VDE node or other electronic appliance 600 in the preferred embodiment may include one or more SPUs 500 [Secure Processing Units]. SPUs 500 may be used to perform all secure processing for VDE 100. For example, SPU 500 is used for decrypting (or otherwise unsecuring) VDE projected objects 300. . . . SPU 500 may also perform secure data management processes including governing usage of, auditing of, and where appropriate, payment for VDE objects 300.

PCT at 189-190. It also states:

---

[9] "Ginter et al." refers to U.S. Pat. No. 5,892,900, issued Apr. 6, 1999, for "Systems And Methods For Secure Transaction Management And Electronic Rights Protection," which is also asserted in the present action.

1   ... an SPU 500 may be implemented as a single integrated circuit "chip" 505 to
provide a secure processing environment in which confidential and/or
2   commercially valuable information can be safely processed, encrypted
and/or decrypted.
3

4   PCT at 190. Thus, the PCT publication discloses a "secure node" – the "'administration'

5   electronic appliance" containing an SPU.

6   f.   **The PCT publication discloses a system where the receiving**
                              appliance is associated with a receiving entity
7

8   The final requirement of element (a) is the "receiving appliance being associated

9   with a receiving entity." The PCT publication discloses a system where each test site is

10   associated with an "administration" electronic appliance:

11   The SAT prepares one copy of the container for each school or other location
             which will conduct the examination. The school or other location ("test
12   site") will be provided with a distributed examination container securely
             containing the VDE identification for the "administration" electronic
13   appliance and/or test administrator at the test site (such as a testing
             organization) and a budget enabling, for example, the creation of 200 test VDE
14   content containers.

15   PCT at 913. For a number or reasons, including the need to delineate the number of tests to be

16   distributed to test takers at each particular site, each test site is associated with an

17   "'administration' electronic appliance."

18   For the foregoing reasons, the PCT publication discloses all requirements of

19   element (a) of claim 91.

20   3.   **Claim 91 – Element (a)(i)**

21 | Claim | (i) the digital information having been selected at least in part based on the |
22 | Language | digital information's membership in a first class, |

23   This limitation requires the digital information referred to in element (a) to be

24   selected at least in part based upon its membership in a first class. For example, the '181

25   specification provides:

26   Of particular importance is the notion of classes of content ... For example, the
             present inventions can make use of ... topical identification, for example, such
27   as information represented in typical library subject and/or author and/or catalog
             and/or keyword search and retrieval information systems ... any information

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1   descriptive of an available resource (which may include any information,
2   product, and/or service, whether available in electronic and/or physical forms)
     such as: the quality of a digital product as evaluated and ranked and/or
3   otherwise specified by one or more third parties and/or independent third
     parties . . . .

4   '181 Patent 14:35-55.

5   As discussed above, the PCT publication discloses a system, which by way of

6   example, can be used to electronically distribute an SAT test to selected testing sites. In the

7   testing example, the distributed information is a particular examination to be given on a specific

8   date at a specific time – "November 15, 1994 at 1:00 PM Eastern Standard time." PCT at 913.

9   Thus, the specific electronic SAT test (digital information) sent to the designated testing sites has

10   been selected at least in part based on the test's membership in a first class (the particular SAT

11   test to be released to testing sites on November 15, 1994 at 1:00 PM Eastern Standard time). The

12   PCT publication provides several other examples of testing scenarios where the tests (digital

13   information) are selected based upon their membership in a particular class:

14   VDE assisted testing may, of course, be employed for many different
             applications including secure identification of individuals for
15   security/authentication purposes, for employment (e.g. applying for jobs)
             applications, and for a full range of evaluation testing. For example, an airline
16   pilot, or a truck, train, or bus driver might take a test immediately prior to
             departure or during travel, with the test evaluating alertness to test for fatigue,
17   drug use, etc. A certain test may have a different order and/or combination of
             test activities each time, or each group of times, the test is taken.
18

19   PCT at 916. In each of these circumstances, the digital information or content of the particular

20   test will be classified based upon its appropriateness to the test takers, the particular venue, date

21   and time of examination, and potentially a host of other factors.

22   Accordingly, the PCT publication discloses a system where the digital information

23   is selected at least in part based on the digital information's membership in a first class.

24   4.   Claim 91 – Element (a)(ii)

25 | Claim | (ii) the first class membership having been determined at least in part using |
26 | Language | rights management information; |

27   As recited in element (a)(ii), membership in the "first class" is determined at least

28   in part based upon rights management information. According to the specification of the '181

1   patent, "[r]ights management information may include electronic rules and/or their

2   consequences." '181 Patent 11:23-25. Referring again to the testing scenario disclosed in the

3   PCT publication, the particular test to be distributed (first class membership) is determined at

4   least in part using rights management information, including any one or more of the following

5   electronic rules and/or consequences, 1) the subject matter of the test, 2) the order of the test

6   questions, 3) which test questions are presented, and/or 4) timing-related variables such as the

7   precise starting, duration and stopping times of the examination. PCT at 916-17.

8   These examples disclose the use of "rights management information" to determine

9   the digital information's membership in a first class.

10   5.   Claim 91 – Element (b)

Claim Language	(b) the receiving entity having been selected at least in part based on said receiving entity's membership in a second class,

13   Element (b) requires the receiving entity to be selected at least in part based on its

14   membership in a second class. The PCT publication's testing example discloses the distribution

15   of a particular SAT examination to a selected class of test sites:

16   A scheduled SAT examination for high school seniors is prepared by the
        Educational Testing Service. The examination is placed in a VDE container for
17   scheduled release on November 15, 1994 at 1:00 PM Eastern Standard
        time. The SAT prepares one copy of the container for each school or other
18   location which will conduct the examination. The school or other location
        ("test site") will be provided with a distributed examination container
19   securely containing the VDE identification for the "administration"
        electronic appliance and/or test administrator at the test site . . .
20

21   PCT at 913. Thus, this passage discloses the requirements of claim 91, element (b) – a particular

22   SAT test is distributed to each test site (receiving entity) that will be administering the SAT on

23   November 15, 1994 at 1:00 PM Eastern Standard time (receiving entity's membership in a second

24   class).

25   6.   Claim 91 – Element (b)(i)

Claim Language	(i) the second class membership having been determined at least in part on the basis of information derived from the recipient entity's creation, use of, or interaction with rights management information;

28

1   As explained above in the analysis of element (b), selected test sites are members

2   of a second class — the class of test sites administering the SAT examination at a particular time

3   and date. Element (b)(i) requires the second class membership to be determined at least in part on

4   the basis of information derived from the recipient entity's creation, use of, or interaction with

5   rights management information. The specification of the '181 patent provides numerous

6   examples of types of "rights management information" that may be used for classification

7   purposes:

8   Rights management information may be directly or indirectly inputted to the
9   matching, classification and/or selection process. . . The following are
         examples of such information that may be provided based, for example, on rules
         and consequences . . . user questionnaires . . . audit trail related information . . .
10   aggregated usage data . . . information measuring or otherwise related to
         institutional behavior; information measuring or otherwise related to;
11   institutional preferences; information measuring or otherwise related to
         institutional culture . . .
12

13   '181 Patent 18:65–19:39.

14   As required by this claim element, the membership in the class of test sites is

15   determined on the basis of information derived from the test site's interaction with rights

16   management information. For example, sites are determined to be members of a class receiving a

17   particular SAT test based upon whether or not that site is scheduled or permitted to administer the

18   exam at a designated date and time. PCT at 913. Sites may also be selected based on content of

19   an examination, i.e. whether it is an SAT test (where the site might be a high school) or a test

20   designed for "an airline pilot, or a truck, train, or bus driver," where the test site might be the

21   appropriate workplace. PCT at 916. In addition, membership in the second class is determined

22   from the use of VDE identifications, which also is rights management information. The PCT

23   publication states:

24   The school or other location ("test site") will be provided with a distributed
25   examination container securely containing the VDE identification for the
         "administration" electronic appliance and/or test administrator at the test
26   site (such as a testing organization) . . . :

27   PCT at 913.

28

1   Thus, the PCT publication discloses a process whereby the second class

2   membership (administering test sites) is determined at least in part on the basis of information

3   derived from the recipient entity's creation, use of, or interaction with rights management

4   information (test type, date, time, etc.).

5   7.   Claim 91 – Element (c)

6 | Claim | (c) receiving at the receiving appliance rules and controls in a secure |
7 | Language | container, |

8   Element (c) requires rules and controls to be received in a secure container at the

9   receiving appliance. The term "controls" has been construed by the Court to mean:

10   "Information and/or programming controlling operations on or use of resources
     (e.g., content) including (a) permitted, required, or prevented operations, (b) the
11   nature or extent of such operations, or (c) the consequences of such operations."

12   Markman Order at p. 36. The term "rules" has not been construed, but in the "mini" Markman

13   proceedings, InterTrust argued that "rules and controls" are equated with "control information" in

14   the Big Book ('107) application, and that the terms "rule" and "control" are "synonymous."

15   InterTrust's Opening Claim Construction Brief at 17-19 (Docket #225).

16   The PCT publication discloses process in which rules and controls are packaged in

17   a secure VDE container. For example:

18   The examination is placed in a VDE container for scheduled release on
     November 15, 1994 at 1:00 PM Eastern Standard time. The SAT prepares
19   one copy of the container for each school or other location which will conduct
     the examination. The school or other location ("test site") will be provided with
20   a distributed examination container securely containing the VDE
     identification for the "administration" electronic appliance and/or test
21   administrator at the test site (such as, a testing organization) and a budget
     enabling, for example, the creation of 200 test VDE content containers. Each
22   container created at the test site may have a permissions record containing
     secure identification information for each electronic appliance 600, on the test
23   site's network, that will be used by a test taker, as well as, for example, an
     identification for the student who will take the test.
24

25   PCT at 913. These passages disclose receiving at the receiving appliance (receipt by test sites)

26   rules and controls (release time, identification requirements, budget) in a secure container

27   ("VDE" or "examination" container), as recited in element (c) of claim 91.

28

8.   Claim 91 – Element (c)(i)

Claim Language	(i) the rules and controls having been associated with the selected digital information; and

Element (c)(i) calls for rules and controls received by the receiving entity to be associated with selected digital information. As explained in the previous section, the PCT publication discloses a process in which an SAT test is packaged into a "secure container" also containing rules and controls (release time, identification requirements, budget) governing access and distribution of the examination. PCT at 913. The fact that these rules and controls are packaged with, and govern the use of, the test contained in the same secure VDE container, demonstrates that the rules and controls contemplated in the PCT publication are "associated with the selected digital information." Accordingly, the PCT publication discloses claim 91 element (c)(i).

9.   Claim 91 – Element (d)

Claim Language	(d) using at the receiving appliance the selected digital information in accordance with the rules and controls,

Element (d) of Claim 91 requires the receiving appliance to use selected digital information in accordance with "rules and controls." As stated above in section III(A)(8), test sites receive a VDE container encapsulating rules and controls including, for example, a budget. This budget sets forth the number of "VDE content containers" that may be produced and distributed to the test-taking students:

> The school or other location ("test site") will be provided with a **distributed examination container** securely containing the VDE identification for the "administration" electronic appliance and/or test administrator at the test site (such as, a testing organization) and a **budget enabling, for example, the creation of 200 test VDE content containers.**

PCT at 913. The "'administration' electronic appliance and/or test administrator at the test site" then creates the number of "test VDE content containers" permitted by the "budget." *Id.*

Thus, the PCT publication discloses a receiving appliance (test site) that uses (creates VDE content containers) the selected digital information (particular test distributed by

1 the Educational Testing Service) in accordance with the rules and controls (*e.g.* a budget), as

2 recited in element (d) of claim 91.

3   10.   Claim 91 – Element (d)(i)

Claim Language	(i) the rules and controls being enforced by the receiving appliance secure node.

6   . The final element of claim 91 requires the secure node of the receiving appliance

7 to enforce the rules and controls associated with the digital information. As explained in

8 Section III(A)(2), the PCT publication discloses an "'administration' electronic appliance" used

9 for receiving the "VDE container" containing the examination and rules governing its use. PCT

10 at 913. This electronic appliance enforces the rules and controls associated with the SAT test, as

11 detailed in the PCT publication's lengthy discussion elaborating on the attributes of such "VDE

12 Electronic Appliance[s]," which contain Secure Processing Units. PCT at 180-194. The PCT

13 publication states:

14   Each VDE node or other electronic appliance 600 in the preferred
              embodiment may include one or more SPUs 500. SPUs 500 may be used to
15   perform all secure processing for VDE 100. . . . It is also used for managing
              encrypted and/or otherwise secured communication . . . SPU 500 may also
16   perform secure data management including governing usage of . . . VDE
              objects . . .

17

18 PCT at 189-190.

19   Thus, the PCT publication discloses a method where rules and controls (*i.e.* release

20 time, identification requirements, budget. etc.) are enforced by the receiving appliance

21 (administration electronic appliance) secure node (having a SPU).

22   B.   The PCT Publication Anticipates All Asserted Claims Dependent Upon Claim
              91 of the '181 Patent.

23

24   Claims 104, 114 and 131 are dependent upon claim 91. Claim 117 is dependent

25 upon claim 114, which in turn, is dependent upon claim 91. As detailed *supra* Sections III(A)(1)-

26 (10), all the elements of claim 91 are present and disclosed in the PCT publication. The PCT

27 publication, as demonstrated in the following sections, also anticipates all claims that depend

28 upon claim 91.

1.   **Dependent Claim 104**

Claim Language	104. The method of claim 91 wherein said received selected digital information includes entertainment information.

As explained in Section III(A)(2) with regard to element (a) of claim 91, the PCT publication discloses a process in which a server transfers "selected digital information" to a receiving appliance. Dependent claim 104 calls for this "selected digital information" to include "entertainment information." The ordinary meaning of "entertainment" is "something diverting or engaging." *Merriam-Webster's Collegiate Dictionary, Tenth Edition* (1999).[10] The '181 specification fails to define or indicate what the term "entertainment information" refers to and, therefore, does not contradict the ordinary meaning of the term.

The PCT publication contemplates the delivery of digital entertainment information to end users. It discloses that a sending appliance may distribute all varieties of digital information, which are listed in a "repository content catalog." PCT at 839. Such digital information may include "lists of publications, software, games, movies, etc." *Id.* Software, games and movies fit within even the narrowest construction of the term "entertainment information." Moreover, the PCT publication discloses that any type of electronic information may be distributed in VDE containers:

> Figure 20 shows an example of a VDE content object structure 880. Generally, content objects 880 include or provide information content. This 'content' may be any sort of electronic information. For example, content may include **computer software, movies, books, music, . . . multimedia information, virtual reality information . . .**

PCT at 407-408. Various examples of information recited in this passage could be included in the category of "entertainment information." Categories such as movies, books and music most certainly fit any definition of entertainment information. Therefore, the PCT publication anticipates claim 104, as it discloses all the elements of claim 91, as well as end user receipt of "entertainment information."

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[10] *Merriam-Webster's Collegiate Dictionary, Tenth Edition* (1999) attached as Exhibit E to the Declaration of Sam O'Rourke.

2. **Dependent Claim 114**

Claim Language	114. The method of claim 91 wherein said rules and controls specify at least one clearinghouse acceptable to rightsholders.

Claim 114 calls for rules and controls, as detailed *supra* Section IIII(A)(7) with regard to element (c) of claim 91, specifying "at least one clearinghouse acceptable to rightsholders." The term "clearinghouse" has been construed by the Court to mean:

> A provider of financial and/or administrative services for a number of entities; or an entity responsible for collection, maintenance, and/or distribution of materials; information, license, etc.

Markman Order at p. 21. The PCT publication discloses a number of different varieties of clearinghouses:

> ... a VDE repository may perform audit information **clearinghouse** services on behalf of VDE creators or other participants (*e.g.* distributors, redistributors, client administrators, etc.) for usage information reported by VDE users. Such services may include analyzing such usage information, creating reports, collecting payments, etc.

PCT at 817. It also provides for clearinghouses that are acceptable to rightsholders:

> A "full service" VDE repository may be very attractive to both providers and users of VDE managed content. Providers of VDE managed content may desire to place their content in a location that is well known to users, offers credit, and/or performs audit services for them.

Id. Accordingly, the PCT publication anticipates claim 114 of the '181 patent, as it discloses all elements of the claim.

3. **Dependent Claim 117**

Claim Language	117. The method of claim 114 wherein said at least one acceptable clearinghouse is a rights and permissions clearinghouse.

As set forth in Section III(B)(2) *supra*, the PCT publication discloses a number of different varieties of clearinghouse. Among them are clearinghouses which provide rights and permissions services:

> The **clearinghouse system 3302B** is comprised of a user/author registration system 3338, template libraries 3340; a **control structure library 3342**; a **disbursement system 3344; an authorization system 3346** comprised of a **financial system 3348** and a **content system 3350** ...

PCT at 821-22. Features such as "a control structure library," "a disbursement system," "an authorization system" and "a content system" are all components of a clearinghouse that distributes, authorizes and governs the use of content. This describes the functionality of a rights and permissions clearinghouse. Accordingly, because the PCT publication discloses all elements of claims 91 and 114 (upon which claim 117 depends), as well as the additional element of claim 117, the PCT publication anticipates claim 117 of the '181 patent.

4. Dependent Claim 131

Claim Language	131. The method of claim 91 wherein said receiving appliance is a personal computer.

In addition to all the elements of claim 91, claim 131 requires that the receiving appliance, discussed *supra* Section III(A)(2), be a personal computer. One ordinary meaning of a "personal computer" is:

> Synonymous with "microcomputer," "desktop computer," and "laptop computer," it is a computer that serves one user in the office or home.

Computer Desktop Encyclopedia at 751. The PCT publication specifically discloses a system where the receiving appliance is a computer:

> Electronic appliance 600 may be practically any kind of electrical or electronic device, such as:
>
> o a computer

PCT at 180. Moreover, the PCT publication specifically discloses that the electronic appliance may be a "personal" computer, stating "if appliance 600 is a personal computer . . ." PCT at 181. Thus, in addition to reading on all elements of claim 91 of the '181 patent, the PCT publication discloses a system where the receiving appliance is a personal computer, thereby anticipating claim 131.

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C. **The PCT Publication Anticipates Claim 48 Of The '181 Patent**

Claim 48 of the '181 patent is very similar to claim 91.[11] The substantive difference between these claims is that claim 91 requires a "secure container," whereas claim 48 omits this requirement. The effect of this omission is to render claim 48 broader than claim 91. This omission also renders claim 48 more easily anticipated, because the anticipating reference need not disclose the use of a "secure container."

Practically, therefore, because claim 91 is anticipated by the PCT publication, claim 48 is as well. Rather than repeat the anticipation analysis set forth in Section III(A) *supra* for claim 48, the following is a chart setting forth the anticipation analyses that is applicable to each element of this claim:

48. A method for narrowcasting selected digital information to specified recipients, including: [Section III(A)(1)]
(a) at a receiving appliance, receiving selected digital information from a sending appliance remote from the receiving appliance, the receiving appliance having a secure node and being associated with a specified recipient; [Section III(A)(2)]
(i) the digital information having been selected at least in part based on the digital information's membership in a first class, [Section III(A)(3)] wherein the first class membership was determined at least in part using rights management information; and [Section III(A)(4)]
(ii) the specified recipient having been selected at least in part based on membership in a second class, [Section III(A)(5)] wherein the second class membership was determined at least in part on the basis of information derived from the specified recipient's creation, use of, or interaction with rights management information; and [Section III(A)(6)]
(b) the specified recipient using the receiving appliance to access the received selected digital information in accordance with rules and controls, [Section III(A)(9)] associated with the selected digital information, [Section III(A)(8)] the rules and controls being enforced by the receiving appliance secure node. [Section III(A)(10)]

D. **The PCT Publication Anticipates All Asserted Claims Dependent Upon Claim 48 Of The '181 Patent**

Claims 59, 61, 63, 70, 72 and 89 are dependent upon claim 48. Claim 62 is dependent upon claim 61 and claim 75 is dependent upon claim 72. Thus both are also ultimately

---

[11]   Non-substantively, claim 48 simply combines several of the elements recited in claim 91 into single elements.

1 dependent upon claim 48. As detailed in the chart *supra* Section III(C), all the elements of claim

2 48 are present and disclosed in the PCT publication. The PCT publication, as demonstrated in the

3 following sections, also anticipates all claims that depend upon claim 48.

4   **1.**   **Dependent Claim 59**

5

Claim Language	59. The method of claim 48 wherein said received selected digital information is at least in part event information.

6

7   Claim 59 requires that selected digital information be at least in part "event

8 information." The ordinary meaning of the term "event" is "something that happens:

9 occurrence." *Merriam-Webster's Collegiate Dictionary, Tenth Edition* (1999). Thus, "event

10 information" is simply information about something that happens. Although the '181 patent fails

11 to define the term "event information," the plain meaning of the term is consistent with its use in

12 the '181 specification:

13   Various ticket agencies 4506(1)-4506(n) may send **information about specific**

14   **events** 4512(1)-4512(n) and/or information about agency services 4514(1)-
4514(n) to the matching and classification utility 900. In another example, an

15   **event promoter may send event information** directly to the matching and
classification utility 900.

16 '181 Patent 80:52-57.

17   The testing example of the PCT publication discloses a test site receiving, in a

18 secure container, information regarding an SAT test. This SAT testing information includes

19 information regarding the date and time of the test:

20   **A scheduled SAT examination for high school seniors is prepared by the**

21   **Educational Testing Service. The examination is placed in a VDE container for**
scheduled release on November 15, 1994 at 1:00 PM Eastern Standard

22   **time.** The SAT prepares one copy of the container for each school or other
location which will conduct the examination.

23 PCT at 913. The PCT publication also discloses other timing related variables:

24   Electronic testing employing VDE 100 may also ensure that timing related

25   variables of testing (for example **precise starting, duration, and stopping**
times) can be reliably managed.

26 PCT at 916. Thus, the received selected digital information (VDE container encapsulating the

27 exam and rules and controls) is at least in part event information (information regarding the

28 release date, timing and schedule of the SAT examination), thereby anticipating claim 59.

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2.   Dependent Claim 61

Claim Language	61. The method of claim 48 wherein said received selected digital information is at least in part entertainment information.

Claim 61 is anticipated because the PCT publication discloses all elements of claim 48 (as demonstrated in Section III(C)), as well as the additional element recited in this claim (as demonstrated in Section III(B)(1)).

3.   Dependent Claim 62

Claim Language	62. The method of claim 61 wherein said entertainment information is at least in part music information.

As demonstrated in Section III(D)(2), the PCT publication anticipates claim 61. Claim 62 depends upon claim 61 and recites the additional element that the "entertainment information" of claim 61 is at least in part "music information." The PCT publication specifically discloses that the digital information received by the receiving appliance can include "music" information:

> Figure 20 shows an example of a VDE content object structure 880. Generally, content objects 880 include or provide information content. This "content" may be any sort of electronic information. For example, content may include . . . music . . .

PCT at 407-08. Accordingly, claim 62 is anticipated by the PCT publication.

4.   Dependent Claim 63

Claim Language	63. The method of claim 48 wherein said received selected digital information is at least in part executable software.

Claim 63, which depends on claim 48, recites the additional element requiring the selected digital information to be at least in part "executable software." The Court has construed the term "executable programming" to mean "A computer program that can run, directly or through interpretation." *See* Order at p. 22 (Docket No. 338). The PCT publication discloses the transmission and reception of digital information that may include "executable software," stating:

> Figure 20 shows an example of a VDE content object structure 880. Generally, content objects 880 include or provide information content. This "content" may

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1 be any sort of electronic information. For example, content may include computer software . . .

2

3 PCT at 407-408. Thus, the PCT publication anticipates claim 63 of the '181 patent.

4   5.   **Dependent Claim 70**

5 | Claim | 70. **The method of claim 48 wherein said rules and controls at least in part** |
6 | Language | **govern usage audit record creation.** |

7   Claim 63, which depends on claim 48, recites the additional element wherein the

8 rules and controls "at least in part govern usage audit record creation." The PCT publication

9 discloses rules and controls that at least in part govern usage audit record creation in its SAT

10 testing scenario:

11   . . . proper use of VDE 100 for the testing process can prevent improper access
        to test contents prior to testing and ensure that test taking is properly audited
12   and authenticated, that is which person took which test, at which time, on
        which electronic appliance, at which location.
13

14 PCT at 916. Thus, the PCT publication anticipates claim 70 of the '181 patent.

15   6.   **Dependent Claim 72**

16 | Claim | 72. **The method of claim 48 wherein said rules and controls in part** |
17 | Language | **specifying at least one clearinghouse acceptable to rightsholders.** |

18   Claim 72 is anticipated because the PCT publication discloses all elements of

19 claim 48 (as demonstrated in Section III(C)), as well as the additional element recited in this

20 claim (as demonstrated in Section III(B)(2)).

21   7.   **Dependent Claim 75**

22 | Claim | 75. **The method of claim 72 wherein said at least one acceptable** |
23 | Language | **clearinghouse is a rights and permissions clearinghouse.** |

24   Claim 75 is anticipated because the PCT publication discloses all elements of

25 claim 72 (as explained directly above in Section III(D)(6)), all elements of claim 48 (as

26 demonstrated in Section III(C)), as well as the additional element recited in this claim (as

27 demonstrated in Section III(B)(3)).

28

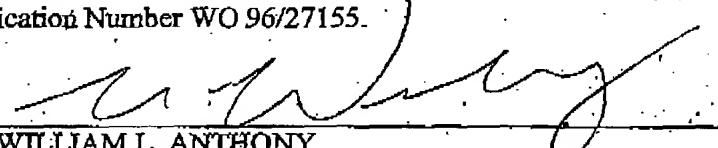DOCSSV1:260337.2   - 24 -   MICROSOFT'S MOTION FOR PARTIAL SUMMARY
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8.   **Dependent Claim 89**

Claim Language	89. The method of claim 48 wherein said receiving appliance is a personal computer.

      Claim 89 is anticipated because the PCT publication discloses all elements of claim 48 (as demonstrated in Section III(C)), as well as the additional element recited in this claim (as demonstrated in Section III(B)(4)).

IV.   **CONCLUSION**

      For the forgoing reasons, Microsoft respectfully requests that the Court declare U.S. Patent No. 6,112,181 invalid as anticipated under 35 U.S.C. § 102(b) by the PCT publication published under International Publication Number WO 96/27155.

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